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Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 75-1528

HOWARD BAPTISTA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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HOWARD BAPTISTA,
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UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner Howard Baptista prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on March 24, 1976.

Opinions Below.

The text of the opinion of the Court of Appeals in this case is reprinted as App. 2-28 hereto.[1] The text of the judgment is reprinted as App. 29 hereto. The trial in the District Court was by jury, and no opinion was filed by the District Court. The text of the judgment of the District Court is reprinted as App. 30-31 hereto.

[1] References to the appendix to this petition will be designated "App. ."

Jurisdiction.

The judgment of the Court of Appeals was entered on March 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

I. Did the trial judge err in instructing the jury that travel or use of the mails by a non-defendant putative victim was sufficient basis for finding a violation by the petitioner of the Travel Act, 18 U.S.C. § 1952?

II. Did the trial judge commit error and thereby violate the due process rights of the petitioner in charging the jury that the petitioner could be convicted under the Travel Act upon a finding of mere receipt by the petitioner of payments voluntarily made by the putative victim Graham thus allowing the government to proceed on inconsistent theories?

III. Were the petitioner's Fifth Amendment due process rights abridged by (1) the government's failure to comply with the District Court's discovery order; and (2) the admission of evidence through four witnesses immunized in violation of 18 U.S.C. § 6003?

Constitutional Provision and Statutes Involved.

CONSTITUTION OF THE UNITED STATES.
AMENDMENT V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The following statutes are set out in the appendix due to their length (App. 32 et seq.):

18 U.S.C. § 1951 (June 25, 1948, c. 645, 62 Stat. 793).

18 U.S.C. § 1952 (Added Pub. L. 87-228, § 1(a), Sept. 13,

1961, 75 Stat. 498, and amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212).

18 U.S.C. § 2 (June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, § 176, 65 Stat. 717).

18 U.S.C. § 6003 (Added Pub. L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927).

18 U.S.C. § 2514 (Added Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216).

Statement of the Case.

The petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered in this case on March 24, 1976, affirming the convictions of the petitioner Howard Baptista. The District Court had jurisdiction over the offenses described in 18 U.S.C. §§ 2, 371, 1951 and 1952.

Prior proceedings and facts.

On March 19, 1975, a six count indictment was returned against the petitioner.

The trial.

After a trial by jury in the District Court, the petitioner was convicted on count I of having conspired to obstruct, delay and affect interstate commerce by extortion of $25,000 from Thomas A. Graham as president of Meridian Engineering, Inc., induced by the wrongful use of fear of economic loss and under the color of official right; on counts III and V of obstructing, delaying and affecting interstate commerce by extortion from Thomas A. Graham as president of Meridian Engineering, Inc. of $25,000 in 1971 and $5,000 in 1972 in violation of the Hobbs Act, 18 U.S.C. §§ 1951 and 2 (A. 8, 11, 12); on count II of having conspired to cause others to travel in

interstate commerce to carry on an unlawful activity in violation of 18 U.S.C. § 371 (A. 7); and on counts IV and VI of causing others to travel in interstate commerce and to utilize the facilities in interstate commerce to carry on an unlawful activity in violation of 18 U.S.C. §§ 1952 and 2 (A. 9, 13-14).[2]

The petitioner was sentenced to a term of two years, the first six months to be served in jail and the balance suspended with probation for 18 months, and was ordered to pay a fine of $6,000. Execution of sentence was stayed pending appeal (A. 860, 861).

At the trial there was evidence of the following:

The petitioner Howard Baptista was the executive director of the New Bedford Redevelopment Authority. The petitioner's co-defendant Stephen Hathaway was the sole proprietor of Stephen Hathaway Construction Materials Supplier Co. of West Roxbury and Manchester, Massachusetts.

Thomas A. Graham was the chairman of the board and president of Meridian Engineering, Inc. (hereinafter referred to as Meridian). Meridian was a design engineering and construction management firm with its principal office in Philadelphia, Pennsylvania (A. 48).

Graham admitted at the trial that prior to his meeting with Baptista in June, 1971, he had, systematically, as chairman of the board and president of Meridian, committed the following illegal acts:

(1) Graham disbursed $5,000 to the majority leader of the Pennsylvania House of Representatives, Joshua Eilberg, by personally delivering cash on three or four occasions, in return for a contract on Temple University (A. 591-592).

(2) Graham disbursed $25,000 total in cash to the state treasurer of New Jersey, one Kervick, for work at the New Jersey College of Medicine and Dentistry, delivering $1,000 sums in hand on approximately 25 occasions (A. 593-594).

(3) Graham disbursed $58,000 between 1970 and 1973 to a New Jersey attorney, one Colsey, who was helpful in getting jobs, deducted as attorney fee payments on Meridian tax returns (A. 603-604).

(4) Graham disbursed between $20,000 and $30,000 to the Mayor of Lancaster, Pennsylvania, in amounts of $1,000 delivered by him in cash in hand (A. 605).

When asked whether he had difficulty getting money out of the company whenever he needed it to give bribes to these people, he replied "No" (A. 608). Graham further admitted that he had developed a scheme through which Meridian got tax deductions for cash disbursements out of a so-called "administrative travel fund" (A. 598-599).

> "There were three purposes of charges that I used to make to the administrative travel account: One would be the administrative travel, the second would be political contributions or payments, and the third one would be money that I also had taken personally on occasion." (A. 595.)

The total of these three categories over the period from 1970-1972 was in excess of $715,000, all deducted from Meridian's gross income (A. 661-662). Of the three purposes stated by Graham, he admitted that the largest amount was for his personal use (A. 596).

[2] This and other references designated "A. " are to the appendix to the brief for the appellants in the United States Court of Appeals for the First Circuit. The appendix will be certified to this Court.

Meridian obtained two contracts with the New Bedford Redevelopment Authority, the first in the summer of 1971 on the West End Urban Redevelopment Project (hereinafter referred to as WEP) and the second in the summer of 1972 for the Neighborhood Development Project (hereinafter referred to as NDP) (A. 63, 121). In early 1971, Meridian worked as a subcontractor on the WEP, under the project consultant Lucas & Edwards, Inc., a firm no longer in existence at the time of trial (A. 50).

There was also evidence, if believed, of the following:

Graham met Lucas[3] on an unspecified date at which time the WEP project was discussed. On June 30, 1971, Graham and Lucas travelled to New Bedford by private plane where for the first time ever Graham spoke with and met Howard Baptista (A. 58). Either before the flight or en route, Graham developed and wrote out a schedule (A. 614-620) containing the words "invoice date," "address," and "amount," with figures adding up to $25,000 (A. 66-67, 614-619).

The subjects of discussion at the meeting were the WEP contract and methods by which payments of funds from Meridian could be disbursed to Baptista. Graham testified that he proposed to Baptista a sum of $25,000, but that he, Graham, needed a vehicle to extract money from the company (A. 66, 614-619). To this request, Graham stated that Baptista gave him four invoices of a contractor friend to use as a vehicle.

The four 1971 invoices were allegedly mailed to 59 Raymond Street, Manchester, Massachusetts. Margaret

[3] Lucas was known to the grand jury, but never testified before the grand jury or at the trial. During argument on requests for instructions, the government stipulated with defendants, and the court so charged, that the only conspiracy which could be found was between Hathaway and Baptista.

R. Hathaway, who had resided at that address for 15 years, testified that Stephen Hathaway had departed permanently from the residence in 1964 (A. 712). She had received no mail whatsoever since 1970 to the present time for Stephen Hathaway at that address (A. 712).

Of the events occurring in 1972, Graham testified about two meetings on consecutive days (A. 647). The first meeting occurred on August 2, 1972, in New York with a Mr. Jerry Sands, whom Graham used on two or three occasions as a "money laundry" (A. 643-647). On those occasions, Sands provided Graham with dummy invoices used in the following manner:

> "The arrangement proposed by the proposer, not Mr. Sands, was that Mr. Sands be instructed to type and send invoices to our company on the occasions when I would want cash, and I would then authorize disbursement of money to Mr. Sands. He would take a tax bite, defined as 35 percent and keep the balance in an account that I had opened specifically for that at the Chase Manhattan Bank in New York." (Thomas Graham, A. 645.)

On the following day, August 3, 1972, a meeting arranged by Graham between himself and Howard Baptista occurred (A. 647). Graham testified that the following events and discussions took place:

Prior to the meeting he had arranged, Graham prepared a schedule similar to the one he had prepared in 1971 (A. 137) (Ex. 3, A. 792).[4] He went to New Bedford

[4] Graham testified on five separate occasions as to the preparation of this 1972 schedule. On three of those occasions, he said he had prepared it prior to his trip; twice he said that, upon the suggestion of IRS Agent Paul Deery he could not have prepared it before (A. 627-638).

and confronted Baptista about the future award of the NDP contract. He offered to arrange a series of payments totalling $5,000 (A. 122).

There was also evidence from which the jury could find that:

The 1972 invoices had as an address for Stephen Hathaway Box 121, West Roxbury Post Office, West Roxbury, Massachusetts (Ex. 4-7, A. 793-796). The record of that post office dating back to 1969 shows that Box 121 was not assigned to Stephen Hathaway and further, that ledger containing forwarding addresses did not contain any address from Stephen Hathaway (A. 512-514). The only connection with Box 121 and Stephen Hathaway was testimony that four or five years before a postal clerk remembered forwarding some mail to South Road in Deerfield, New Hampshire (A. 514-541). The postmaster of Deerfield recalled receiving some mail for Hathaway between the years 1968-1971 and forwarding some mail to Biddeford, Maine. The postmaster at Biddeford, Maine had no way of telling whether or not Stephen Hathaway had ever received mail there, as they kept no records, although Hathaway was listed as a patron of an RFD Route.

At the conclusion of the government's case, the defendants filed motions for acquittal (A. 850, 851). The Court reserved hearing and decision on the motions for acquittal.

On July 22, 1975, defendants' motion to require election by the United States or in lieu thereof for judgment of acquittal was heard and the motion was denied. Requests for instructions were submitted and heard and various objections were taken by the defendants (A. 841-849).

On July 23, 1975, the jury received the court's instructions. The jury returned a verdict of guilty on each

count as to each defendant. The defendants renewed their motions for judgment of acquittal.

The defendants seasonably filed motions for new trial (A. 852-855). On July 29, 1975, a hearing was held on the reserved motions for judgment of acquittal and on the motions for new trial. Judge Murray denied the motions for acquittal on July 31, 1975 (A. 850, 851).

On August 26, 1975, the motions for new trial were denied, and certain papers on the issue of authorization for the grant of immunity were impounded (A. 858).

Each defendant filed a separate timely notice of appeal (A. 859, 862, 863), and subsequently filed a joint notice of appeal.

Judge Murray after hearing argument by counsel for the defendants and the government, ordered the impounded papers relevant to the authorization request for immunities released for the sole purpose of review in preparation for this appeal (A. 867). The government and the defendants stipulated to facts relating to that issue (A. 865-867).

Proceedings relating to certain immunity grants.

Prior to trial, the defendants filed motions seeking compliance by the government with the District Court's order of discovery (A. 15a, 15b). Following the government's failure to comply (A. 32, 33), a hearing before Judge Murray on June 16, 1975, resulted in his ordering the compliance as set forth in his notice of June 23, 1975 (A. 34).

In response to the defendant Baptista's motion for divulgence of grants of immunity and similar actions by governmental authorities (A. 18, 19), the order of June 23, 1975, required the government "to disclose the information, including copies of documents to the defendant not

later than June 30, 1975" (A. 34). Despite the order of the court, the government failed to comply fully prior to trial. After the first day of trial, July 8, 1975, the government produced so-called FBI 302 reports of investigation. In the prefatory statements as to several of the Meridian interviewees and grand jury witnesses, there was reference to an apparent understanding that such witnesses were not intended to be prosecuted. On July 9, 1975, the government requested the court for the first time to sign orders compelling the testimony of six of these individuals: Timothy McDonald, Carl Sinibaldi, Kenneth Cestari, Caesar Wheeler, Carol Nozka and Monica Seidlecki (A. 7, 8). In the hearing on this request, the government for the first time produced a letter granting informal immunity to several of those witnesses (A. 2-32, 2-33).

The objections raised by the defendants at trial (A. 170-175) and subsequently in the motion for new trial (A. 852-855) resulted in the impoundment by Judge Murray of one letter related to that issue (A. 858). On September 29, 1975, following a post-trial hearing before Judge Murray, modification of the impoundment order was allowed (A. 864). Stipulations between the government and the defendants were agreed upon subsequent to that order (A. 865-867).

Reason for Granting the Writ.

The reasons for this Court's granting the writ of certiorari will be separately advanced under each of the issues addressed below.

I. Did the Trial Judge Err in Instructing the Jury that Travel or Use of the Mails by a Non-Defendant Putative Victim was Sufficient Basis for Finding a Violation by the Petitioner of the Travel Act, 18 U.S.C. § 1952?

The Court of Appeals for the First Circuit decided issues in this case in direct contravention of the holding in *Rewis* v. *United States,* 401 U.S. 808 (1971), and the principles announced therein. The petitioner was convicted for violations of the Travel Act, 18 U.S.C. § 1952 where there was neither allegation in the indictment nor evidence in the record that he engaged in any interstate activity in furtherance of an unlawful purpose. The only evidence of interstate activity was that by the non-defendant putative victim. There was no evidence to show and no finding to establish that the victim was an agent or employee of the petitioner. Accordingly, the facts of this case raise directly the scope of the holding of this Court in *Rewis* v. *United States, supra,* where it was held that use of interstate facilities by non-defendant victims of an unlawful activity was not caused by the defendant. Should this Court find that its holding in *Rewis, supra,* does not dispose of this case, it is still appropriate for review. *Rewis* expressly reserved for a case properly presenting it, the question of the extent of encouragement required for finding that a defendant's conduct approximated the conduct of a principal in a criminal agency relationship sufficient to warrant application of the Travel Act. The petitioner's is such a case.

An indispensable element of a prima facie case under the Travel Act, 18 U.S.C. § 1952, is interstate travel or use of an interstate facility in furtherance of unlawful activity. The government conceded that it could not

show that the petitioner traveled or used any facility in interstate or foreign commerce. Instead, the government sought to ascribe to the petitioner the travel of Thomas Graham, a non-defendant putative victim, to New Bedford and his mailing of checks to the defendant Hathaway in an attempt to supply the missing requisite interstate element of the offense. Although the Court of Appeals rejected the government's contentions regarding Graham's travel to New Bedford as unsupported by sufficient evidence of inducement, it affirmed the petitioner's Travel Act conviction under 18 U.S.C. §§ 1952 and 2 by finding that the trial court's instructions to the jury comported with the standard announced in *United States* v. *Rewis, supra.* The petitioner disagrees.

Rewis reversed a conviction under the Travel Act where, as here, the only interstate activity was that of the victim; where as here, the petitioner could have reasonably foreseen interstate travel by victims; and where as here, the victim was neither an employee nor an agent of the petitioner. In so doing, this Court stated that the legislative history of § 1952 strongly suggested that the Travel Act should not apply to criminal activity in such situations out of comity for the states.

The government argued in *Rewis* that where the owner of an illegal operation could foresee that customers would cross state lines, the interstate element of § 1952 was fulfilled. This Court rejected such an interpretation noting that there was little, if any, evidence that Congress intended foreseeability to govern criminal liability under § 1952. Regardless of this pronouncement, the Court of Appeals placed great reliance on foreseeability in finding the minimal activity of the petitioner in giving a few blank invoices of a company with a Massachusetts address to Graham in Massachusetts as sufficient evidence of causation or inducement to satisfy 18 U.S.C. §§ 1952 and 2. The Court of Appeals states that Baptista, "knew that Meridian was a Pennsylvania-based company and that the address of the invoices was in Massachusetts" (App. 20). This is the sole finding of the Court of Appeals regarding a showing to support its contention that the petitioner caused or induced the mailings. It is this reliance on foreseeability, denounced by this Court as an overly expansive construction of § 1952 as well as unintended by Congress to govern criminal liability under § 1952, upon which the Court of Appeals rests its decision. The effect of such a finding by the Court of Appeals is a total erasure of state lines.

Thus far this Court has recognized only one instance in which the interstate activities of one person can permissibly be attributed to another, the instance where an employer-employee or agency relationship is found to exist. *United States* v. *Chambers,* 382 F. 2d 910 (6th Cir. (1967). *United States* v. *Barrow,* 363 F. 2d 62 (3d Cir. 1966). *United States* v. *Zizzo,* 338 F. 2d 577 (7th Cir. 1964). The case at bar does not present such a situation as Graham was not found to be an employee or an agent of Baptista's. In fact, the government stipulated that the only conspiracy that could be found in the case was between Hathaway and Baptista. Had Graham been an agent or employee of Baptista, on the evidence presented, he surely would have been found to have conspired with the petitioner. A stipulation that there could be no conspiracy between Graham and Baptista is evidence that there was no agreement between them. Since this case lacks such an employee or agency relationship, the Court of Appeals and the trial court have expanded the reach of the Travel Act to proportions beyond those authorized by this Court, or indeed, by Congress.

To the extent circumstances such as these have been considered by Courts of Appeals, see e.g. *United States* v. *De Cavalcante*, 440 F. 2d 1264 (3d Cir. 1971), and *United States* v. *Marquez*, 449 F. 2d 89 (2d Cir. 1971), the facts do not even remotely approach those in petitioner's case. These are the only cases wherein the interstate activity of a victim was imputed to a person charged under the Travel Act who did not himself engage in interstate activity.

Marquez involved a victim who was an employee of the defendant. The facts of *Marquez*, therefore, place it squarely within the agent or employee exception to the general rule recognized by this Court in *Rewis*, that the defendant must have engaged in interstate activity.

In *De Cavalcante* the victims of an extortion scheme were forced to travel interstate to pay money to individuals who had previously robbed them at gunpoint. The interstate travel of the victims was attributed to the extorters under 18 U.S.C. § 2(b) which requires one *willfully* to cause an act to be done. The Court stated that "use of the word 'causes' in the statute (18 U.S.C. § 2(b)) conveys an intent sufficiently broad to encompass not only voluntary acts of true agents, but also the involuntary acts of victims. The jury in the case at bar was not required to find nor was asked to find that the payments made by Graham were made involuntarily. The jury had to find only that Baptista caused or induced Graham to use the mails. The only evidence the jury had before them upon which they could find Baptista caused or induced Graham to use the mails was evidence that Baptista gave Graham blank invoices of a Massachusetts company. As the jury merely had to find that the petitioner caused or induced Graham to use the mails while § 2(b) requires a finding of willfully causing, the jury was allowed to convict on a less stringent standard than that required in § 2(b).

Both *Marquez* and *De Cavalcante* involved situations wherein a victim was threatened with death or bodily harm by the defendant unless that victim did something ordered by the defendant. To understate the issue, such a situation most certainly "causes" a person to do something. To cite such cases as authority for the contention that the petitioner's giving blank invoices to Graham "caused" Graham to mail something is unreasonable and inappropriate.

In addition, the facts of this case regarding Graham must be continuously borne in mind. Graham testified as set out *supra* that he had bribed four individuals in an amount exceeding $100,000 in return for contracts. Thus Graham was no stranger to making payments such as those he made to Baptista. To say that the petitioner caused or induced an individual with a history such as Graham's to use the mails to make such payments sufficient for the petitioner to have violated § 1952 defies the facts of this case.

This Court in *Rewis* conclusively rejected an expansive interpretation of the Travel Act as a broad interpretation would alter sensitive federal-state relationships. Additionally, as noted by other courts, the legislative history of the Travel Act reveals that Congress passed the act in an attempt to aid state officials where criminal activity was carried on in one state by individuals residing and acting in another. The conviction of the petitioner, in the instant situation, offends traditional notions of comity of the states as here Massachusetts has not chosen to prosecute the petitioner when it clearly could do so. This is particularly true where as in this case the federal nexus is so remote that the government must strain to find the required interstate element. There is no question in this case of Massachusetts not being able to reach the activity of the petitioner. Thus, there is no necessity for federal intrusion with respect to the petitioner.

It is ironic that the Travel Act is here used to prosecute defendants whose sole activity was intrastate through the use of a putative victim who and who alone was the interstate traveler. Such an application of the Travel Act turns federal-state relationships on their heads and if fostered by this Court, will lead inevitably to an over-reliance by state prosecutors on the federal presence. The administration of the criminal law — both state and federal — will be better served by a clear pronouncement from this Court that local crimes should be prosecuted primarily locally.

II. Did the Trial Court Commit Error and Thereby Violate the Due Process Rights of the Petitioner in Charging the Jury that the Petitioner could be Convicted under the Travel Act upon a Finding of Mere Receipt by the Petitioner of Payments Voluntarily Made by the Putative Victim Graham, thus Allowing the Government to Proceed on Inconsistent Theories?

The government initially proceeded on a theory of extortion under the Hobbs Act, 18 U.S.C. § 1951. However, the Court's instructions to the jury under the Travel Act, 18 U.S.C. § 1952 allowed conviction on mere proof of receipt by Baptista of payments *voluntarily* made by Graham. In giving such instructions, the jury was allowed to convict under the Travel Act for mere bribery and was not required to find extortion. As a result, the government was allowed to try its case on the six counts of the indictment using inconsistent proofs. The petitioner seasonably moved to require election by the government. The trial court, however, denied this motion.

Traditionally the essence of extortion is duress while that of bribery is voluntariness on the part of the person offering the bribe. *United States* v. *Addonizio,* 451 F.2d 49

(3d Cir. 1972). While the jury was required to find that Baptista induced or coerced Graham to make the payments under the Hobbs Act, the jury was allowed to find these same payments were voluntarily made by Graham under the Travel Act. It is in this sense that the government's proofs are inconsistent. Regardless of the labels of bribery and extortion, the heart of the petitioner's claim is that a singular transaction has been inconsistently characterized both as voluntary and as coerced or induced.

The Court of Appeals stated in its opinion that bribery and extortion are not mutually exclusive, citing *United States* v. *Braasch,* 505 F.2d 139 (7th Cir. 1974), and *United States* v. *Kahn,* 472 F.2d 272 (2d Cir. 1973), in support of this contention. However, *Kahn* and *Braasch* present factual situations differing significantly from that of the instant case in which one individual, Baptista, was found guilty of both bribery *and* extortion for a singular transaction.

In *Braasch,* the petitioner claimed that his conduct was that of bribery and not extortion, and therefore, he could not be convicted under the Hobbs Act, 18 U.S.C. § 1951, as it required proof of extortion. The court responded by saying that for purposes of the Hobbs Act, that which might constitute "classic bribery" could also be extortion. The court nowhere intimated that the same individual could, for the same act, be convicted of both bribery and extortion. Moreover, the court in *Kahn* said that if one individual could be found to have voluntarily made payments to a person charged with a violation of the Hobbs Act, that such voluntariness could be evidence of lack of intent to commit extortion by the person charged under the Hobbs Act. *Kahn* addressed the issue of whether bribery was a complete defense to a charge of extortion. Again the guilt of two individuals was involved.

The petitioner is not complaining that the transaction should be classified as bribery or blackmail and not extortion, as in *United States* v. *Nardello,* 393 U.S. 286 (1969) (appeal from U.S. District Court, E.D. Pa.), but rather that the same payment cannot be found both to have been induced or coerced by the petitioner to obtain a conviction under the Hobbs Act and then transformed into a voluntary payment so that the government could obtain a conviction of the petitioner under the Travel Act on a theory of bribery.

As the trial court did not require election by the government, the Fifth Amendment due process rights of the petitioner were violated.

III. Were the Petitioner's Fifth Amendment Due Process Rights Abridged by (1) the Government's Failure to Comply with the District Court's Order; and (2) the Admission of Evidence Through Four Witnesses Immunized in Violation of 18 U.S.C. § 6003?

The trial judge erred in admitting evidence from four witnesses who were granted immunity in violation of 18 U.S.C. § 6003 (App. 34). The petitioner believes that his Fifth Amendment due process of law rights were abrogated by these violations of 18 U.S.C. § 6003.

Given the unusual circumstances underlying the authorization and requests for immunity by the government on the second day of trial, the petitioner seasonably objected to the issuance of immunity orders, and renewed this objection in the motion for new trial (A. 852-855).

The issue of whether or not the summary manner in which these grants of immunity were obtained comports with due process is an appropriate question which the petitioner has standing to raise.

The trial judge issued discovery orders (A. 15a, 34) requiring *inter alia* the government to disclose any information or documents wherein grants of immunity or similar promises or benefits to prospective witnesses were contained. The government clearly violated these orders by withholding material covered by them.

The clear violation of the discovery order became apparent for the first time (A. 161-162) on the second day of trial when the government produced a letter to Leonard Bucki, Esquire, counsel to the four Meridian employees, whose grants of immunity are the subject of this violation. The letter plainly promised that no prosecutions would result from any testimony given at trial (A. 161-162). Clearly such promises of non-prosecution were purposefully withheld from the defense, in direct contravention of the District Court's discovery orders.

On July 9, 1975, the second day of trial, the government requested a recess for the purpose of seeking authorization from the Department of Justice in Washington to request orders of immunity for Carl Sinibaldi, Timothy McDonald, Caesar Wheeler, Kenneth Cestari, Carol Nozka, and Monica Seidlecki.

Less than two hours later, the government produced authorization for grants of immunity from Assistant Attorney General Richard L. Thornburgh. Thornburgh had been sworn into that position on the previous day. The petitioner objected to the summary manner in which this authorization was both requested and received (A. 169, 174). The trial judge then ordered Assistant United States Attorney Brooks to produce the request document signed by United States Attorney Gabriel, as required by 18 U.S.C. § 6003.[5]

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[5] The letter from U.S. Attorney Gabriel to Assistant Attorney General Thornburgh was impounded by order of Judge Murray. Defense counsel was allowed to review this letter after a special hearing was held before Judge Murray (A. 864). The letter is not reproduced in the Appendix, per order of Judge Murray, but has been transmitted to the Court under seal.

The government has admitted that contrary to the statements in the July 8, 1975 letter, the official forms USA-167 for requests of immunity were never forwarded to the Department of Justice (A. 865).

The petitioner believes that Assistant Attorney General Thornburgh was not apprised of the facts and circumstances necessary for the exercise of informed judgment required by 18 U.S.C. § 6003. Considering the unusual haste of the government, the absence of the information usually included in Form USA-167, and the probable non-familiarity with his recently acquired position, there is substantial doubt that his approval was obtained in compliance with the requirements and intent of 18 U.S.C. § 6003.

The statute purposely interposes the approval of the attorney general or the specially designated senior official between the United States attorney and the District Court prior to the grants of immunity. It is the overall perspective of the official in a centralized role in the Justice Department which provides assurance of meaningful consideration.

Richard L. Thornburgh assumed his position no more than 24 hours before making these decisions. His determination could not have been made with the appropriate overall perspective when made in haste by a person in that role for the first day.

The legislative history of both 18 U.S.C. § 6003 and its predecessor 18 U.S.C. § 2514 (App. 35) indicate a particular concern that immunity grants be issued by the courts only upon evidence of the exercise of informed judgment by both the U.S. attorney and the senior official in Washington. During Senate hearings, Congressman Richard Poff, member of the National Commission on Reform of Federal Criminal Laws, testified as follows:

> "Is the public need for the particular testimony or documentary information in question so great as to override the social cost of granting immunity and thereby possibly pardoning a person who has violated the criminal law? Such a calculation can be made only by a person familiar with the total range of law enforcement policies which would be affected by an immunity grant, and not by one familiar only with the asserted public need in the particular case."[6]

The concern for the exercise of informed judgment by the responsible Department of Justice official is similar to the rationale of the Supreme Court's decision in *United States* v. *Giordano,* 416 U.S. 505 (1974).

In *Giordano,* the Court held that the pre-application approval for wiretaps could only be given by the officials designated in the statute. Because Congress specfically designated particular officials, the Court held that the "mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order." *United States* v. *Giordano,* 416 U.S. at 515-516.

The precise reasoning applied by the Court to 18 U.S.C. § 2516 must be accorded the immunity statute, § 2514, incorporated into the wiretap section with § 2516. In 1970, 18 U.S.C. § 6003 was passed to replace § 2514, but only to change the nature of the statute from transactional to use immunity. Nowhere in the legislative history does the Congress modify the requirement of informed judgment

[6] Senate hearings on S. 30, "Measures Relating to Organized Crime." Hearings before Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 91st Congress, first session, March 18, 19, 25, 26; June 3, 4, 1969, p. 287-312. See also Senate Report no. 91-617, December 18, 1969, and House Report 91-1188, June 15, 1970 for further legislative history.

by a senior Department of Justice official. Clearly, 18 U.S.C. § 6003 adopts that precondition to the fullest extent.

In light of the practices revealed in *Giordano,* wherein non-designated officials routinely perform these discretionary tasks, and in view of the probable lack of familiarity with his new position, the hasty approval of the grants of immunity without the necessary information does not meet the requirements of 18 U.S.C. § 6003.

The petitioner has undisputable standing to *raise this issue.* He and he alone is likely to be concerned with the loose immunizing of witnesses. A person who benefits from such practice by gaining immunity is unlikely ever to complain. The offending United States officials granting the immunity are estopped from raising the issue. Only the victim of such immunity grants has the interest requisite to call to a court's attention events such as are exposed in the present case. Such circumstances surely constitute "standing," unless violations and mockeries of law are to be unchallenged. Further, under the facts of this case, clear orders of a District Court relating to the divulgence of immunity information were violated. The petitioner has standing to seek the imposition of sanctions for those violations.

Without the appearance of the witnesses improperly immunized in this case, crucial evidence both testimonial and documentary essential to the government's case would be lacking. *See,* e.g., Ex. 4-21 (A. 793-809). The government should not be allowed the fruits of its violations of court orders and Congressional mandates. The conviction of the petitioner under all counts is thus tainted by the immunity grants and as such is in violation of the petitioner's due process rights.

Conclusion.

For the reasons stated, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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